

STATE OF MICHIGAN
COURT OF APPEALS

RHONDA RENEE GREEN,

Plaintiff-Appellee,

v

OFFICER JILL KULHANEK, OFFICER
ANNETTE M. COPPOCK, OFFICER BRENT
YUCHASZ, OFFICER LEON FORYSTEK, and
SERGEANT AMY F. WALKER,

Defendants-Appellants,

and

OFFICER MICHAEL ARNTZ and SERGEANT
STACY CAIN,

Defendants.

RHONDA RENEE GREEN,

Plaintiff-Appellee/Cross-Appellee,

v

OFFICER MICHAEL ARNTZ and SERGEANT
STACY CAIN,

Defendants-Appellants,

and

SERGEANT AMY F. WALKER,

Defendant-Cross-Appellant,

and

UNPUBLISHED

October 1, 2009

No. 285882

Washtenaw Circuit Court

LC No. 06-001404-NZ

No. 285918

Washtenaw Circuit Court

LC No. 06-1404-NZ

OFFICER JILL KULHANEK, OFFICER
ANNETTE M. COPPOCK, OFFICER BRENT
YUCHASZ, and OFFICER LEON FORYSTEK,

Defendants.

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendants appeal as of right from the circuit court's order denying in part their motions for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). We reverse and remand for entry of an order granting summary disposition on all counts.

Plaintiff brought the original four-count complaint alleging assault and battery, intentional infliction of emotional distress, false arrest and imprisonment, and gross negligence against defendants, members of the Ypsilanti Police Department (YPD) and Eastern Michigan University (EMU) Police, based on an incident occurring on December 29, 2004, which resulted in her arrest. The circuit court granted summary disposition of plaintiff's claims of intentional infliction of emotional distress and false arrest and imprisonment. The court found, and the record demonstrated, that YPD and EMU officers were justified in arresting plaintiff and that plaintiff resisted her arrest. Defendants argue that the court should have granted summary disposition with regards to the remaining two counts.

We review de novo a trial court's decision concerning a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In determining whether summary disposition under MCR 2.116(C)(7) was appropriate, a court considers all documentary evidence submitted by the parties, accepting as true all the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. See *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994). Summary disposition under MCR 2.116(C)(7) may be granted when "immunity granted by law" bars a claim. A motion to dismiss under MCR 2.116(C)(10) tests the factual support of a claim and may be granted where there is no genuine issue regarding any material fact. *Nichols v Clare Comm Hosp*, 190 Mich App 679, 681; 476 NW2d 493 (1991). The court must review the parties' "affidavits, pleadings, depositions, admissions, and other evidence submitted . . . in the light most favorable to the party opposing the motion." *Maiden, supra* at 120. Under MCR 2.116(G)(4), the party opposing summary disposition must respond with evidentiary support demonstrating the existence of a factual dispute rather than merely relying on allegations or denials in the pleadings. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

The circuit court erred by not granting defendants' motions for summary disposition of plaintiff's "gross negligence" claim under MCR 2.116(C)(7), because there was no evidence identifying any action by any defendant constituting gross negligence that was the proximate cause of injury or damage. Governmental immunity from negligence claims applies to officers of a governmental agency when they are acting, or reasonably believe they are acting, within the scope of their employment, they are exercising or discharging a governmental function, and their

conduct does not amount to gross negligence that is the proximate cause of injury or damage. MCL 691.1407(2). MCL 691.1407(2) does not create an independent cause of action called “gross negligence.” *Cummins v Robinson Twp*, ___ Mich App ___, ___ NW2d ___, 2009 WL 1363409 (2009). However, assuming plaintiff was alleging a “negligence” claim in the “gross negligence” count of her complaint, she failed to demonstrate negligence consisting of: “(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Cummins, supra*; see also *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005).

Plaintiff’s inability to establish specific actions done by the named defendants makes it impossible to demonstrate that they breached any duty, in order to demonstrate negligence on their part. Even if plaintiff could demonstrate that defendants had a duty towards her and that they breached that duty, to permit recovery their conduct would still have to amount to gross negligence that was the proximate cause of injury or damage. Gross negligence is defined under MCL 691.1407(7)(a) as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” Proximate cause in the context of MCL 691.1407(2) refers to the cause that is “the one most immediate, efficient, and direct cause preceding an injury.” *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Even when taking the evidence in the light most favorable to the plaintiff, there was simply no evidence implicating *the named defendants*.

The only actions clearly attributable to any of the defendants were those detailed in the police reports, none of which amounts to gross negligence. Defendants should have been afforded governmental immunity under MCL 691.1407(2) as to plaintiff’s claim of “gross negligence.” The circuit court therefore erred by not granting defendants’ motion for summary disposition of plaintiff’s “gross negligence” claim under MCR 2.116(C)(7).

The circuit court also erred by denying defendants’ motion for summary disposition of plaintiff’s assault and battery claim under MCR 2.116(C)(7). MCL 691.1407(3) clearly states that MCL 691.1407(2) “does not alter the law of intentional torts as it existed prior to July 7, 1986.” Recently, the Michigan Supreme Court, in *Odom v Wayne County*, 482 Mich 459, 480; 760 NW2d 217 (2008), indicated the proper method for determining whether immunity should apply to intentional torts (such as assault and battery). See also, generally, *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). The Court stated that employees enjoy a qualified right to immunity if (1) the employee’s challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, or not with malice, and (3) the acts were discretionary, rather than ministerial, in nature. *Id.*

Here, defendants were clearly acting during the course of their employment and within the scope of their authority. The circuit court found that they had cause to arrest plaintiff, and plaintiff acknowledges that all defendants were acting as officers of their respective agencies. The record also fails to reveal any evidence that their actions were not in good faith or were carried out with malice. Officers were faced with a large, unruly crowd, and plaintiff resisted arrest. The only actions attributable to the officers on the record were clearly undertaken in good faith to effectuate a lawful arrest. Their actions, in deciding how to respond to the large crowd

and effectuate the lawful arrest of plaintiff as she resisted, were clearly discretionary. The officers' reports clearly demonstrated they met the standard outlined in *Odom, supra* at 480. Therefore, the circuit court erred by not granting defendants' motion for summary disposition under MCR 2.116(C)(7) regarding plaintiff's assault and battery claim.

Lastly, the circuit court erred by not granting the EMU defendants' motion for summary disposition under MCR 2.116(C)(10)¹ regarding plaintiff's claim of assault and battery. Under MCR 2.116(G)(4), the party opposing a summary disposition motion brought under MCR 2.116(C)(10) must respond with affidavits or other evidentiary support demonstrating the existence of a factual dispute, rather than merely relying on allegations or denials in the pleadings. For plaintiff to meet her burden of establishing a genuine issue of material fact, she must offer more than just conjecture and speculation. *McCune v Meijer, Inc.*, 156 Mich App 561, 562; 402 NW2d 6 (1986). Plaintiff failed to demonstrate that a factual dispute actually existed. Even taking the evidence in the light most favorable to plaintiff, plaintiff is still unable to identify any of the defendants or their actions. The conduct of the officers depicted in their reports did not amount to gross negligence, and they acted reasonably under the circumstances to effectuate a lawful arrest. Plaintiff's claim that she was continually beaten for fifteen minutes amounts to nothing more than conjecture and speculation when she cannot offer further evidence attributing specific acts to the named defendants. The affidavit produced also fails to raise a genuine issue of material fact. The circuit court therefore erred in denying the EMU defendants' motion for summary disposition under MCR 2.116(C)(10).

Reversed and remanded for entry of an order granting defendants' motions for summary disposition with regard to all counts of plaintiff's complaint. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray

¹ The EMU defendants specifically refer to MCR 2.116(C)(10) in their appellate brief.